Supreme Court, U.S.
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85-809

NO.

IN THE

Supreme Court of the United States

October Term, 1985

ROSALIND M. PLUMMER, ESQUIRE,
Petitioner,

V.

GEORGE AMAN, III, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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60pp

QUESTIONS PRESENTED

I. Whether it is an abuse of discretion and prejudicial per se for a federal trial judge to implement a voir dire process which: 1) restricts the opportunity for a litigant to challenge jurors for cause; 2) precludes a litigant from challenging jurors for cause outside the hearing of the entire jury panel; 3) restricts a litigant to use of her peremptory challenges to remove jurors who are challenged for cause; and 4) impedes a litigant's opportunity for inclusion of racial minorities on an all white jury panel in a race and sex discrimination case.

II. Whether, consistent with Sections 1866(c) and 1870 of the Jury Selection and Service Act and the due process clause of the 14th Amendment to the U.S. Constitution, a federal trial judge has

an 'affirmative' duty to protect the integrity of the jury by removing a prospective juror where there is an obvious potential for improper influence through that juror.

III. Whether it is improvident, an abuse of discretion and prejudicial per se for a trial judge to select the jury foreman where: 1) the designated foreman had been legal secretary to members of the law firm representing the defendants; 2) the designated foreman had also been legal secretary to the trial judge; and several other Third Circuit judges and one of the named defendants is a former Third Circuit judge who served contemporaneously with the trial judge; 3) the trial judge, but not the petitioner, was informed by internal memo that the Chief Judge of the Eastern District of Pennsylvania, originally assigned to the case, had recused

himself due to his close personal relationship with the named defendant and former federal judge; and 4) questions had previously been raised as to the propriety of her inclusion on the panel.

IV. In determining if the trial judge's overall conduct before the jury was prejudicial with due regard to the tonality and circumstances surrounding his words and actions, whether it is improvident for a Court of Appeals to deny oral argument where the trial record is incomplete in that regard.

V. Whether it is reversible error for the district court to deny a plaintiff in a gender and race based employment discrimination case discovery of defendants' Equal Employment Opportunity Reports, submitted to the federal government in compliance with defendants' non discrimination requirements.

PARTIES

The litigants before the Court of Appeals for the Third Circuit were Rosalind M. Plummer, Esquire, a black female attorney, who was the plaintiff in the District Court and the appellant in the Court of Appeals, and the named partners and law firm partnership Morgan, Lewis & Bockius,* which were the defendants in the District Court and the appellees in the Court of Appeals.

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* George Aman, III, Clive Anderson, John Bales, III, Jackson Bonney, Denis Brennan, John Brittain, Richard Brown, Jr., Brady Bryson, Barclay Cale, Jr., Jay Clavert, Jr., Raymond Cullen, George Davies, Mark Dichter, Park Dilks, Jr., William Doran, William Goldstein, Gregory Harvey, Joseph Hennessy, Robert Hodavance, James Hunter, Jr., James Jennings, Miles Kilpatrick, Thomas Kittredge, Henry Klaiman, Robert Kleeb, Arthur Klein, Frederick Knight, 3d, Richard Koffey, Warren Laddon, Thomas Lefevre, John Lewis, Jr., George Lieberman, Arthur Littleton, George Loveless, William Macon, IV, James MacIntosh, Thomas Masterson, James Matthews, Jr., George Mayrosh, Robert McAdoo, John

McConnell, Kenneth Myers, Wesley Nagle, David O'Brien, Joseph O'Connor, Jr., Stuart Odell, Timothy O'Reilly, Benjamin Quigg, Jr., Harry Reagan,, Alan Reed, Angus Russell, John Schaeffer, Jr., Donald Scott, Howard Shecter, Lee Snyder, Peter Somers, Marc Sonnenfeld, Allen Stewart, Walter Strine, Jr., Howard Taylor, Jr., William Taylor, Joseph Torregrossa, William Wood, Robert Young, William Zeiter, Robert Zimmerman and Morgan, Lewis & Bockius.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
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The petitioner, Rosalind M. Plummer, Esquire, respectfully prays that a Writ of Certiorari issue to review the judgments and opinions of the United States

Court of Appeals for the Third Circuit entered in the two consolidated appeals in this proceeding on August 14, 1985.

OPINIONS BELOW

Two appeals were taken from Orders in the District Court. The two appeals, 85-1006 and 85-1007, were consolidated. The non-published opinion of the Third Circuit Court of Appeals on the consolidated appeals appears as Appendix A, hereto. The Court of Appeals decisions denying Petitioner's consolidated Motions for Clarification and for Rehearing En Banc appear as Appendix B, hereto. The District Court opinions in response to Petitioner's Rule 59 and Rule 52(b) post trial motions encompassed aspects of the issues raised here. (C.R./D.I.## 118 and 125, respectively).[1]

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1 (C.R./D.I.# means Court Record, Docket Entry Item #)

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on August 14, 1985. Petitioner filed three consolidated motions; 1) for clarification of the Circuit Court opinion, 2) for rehearing en banc of the three judge opinion and 3) for reconsideration en banc of the denial of Petitioner's motion for oral argument in view of the incompleteness of the trial transcript with respect to the matters at issue. No decision was rendered on the Motion for Reconsideration of the Order Denying Oral Argument on Appeal, however, the two primary Motions for Clarification and Rehearing En Banc were denied on September 3, 1985. (Appendix B).

This petition for writ of certiorari was filed within 90 days of the date of the Third Circuit Court's denial of Peti-

tioner's Motion for Rehearing En Banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[2]

1. United States Code, Title 28: The Jury Selection and Service Act, 28 U.S.C., Sections 1866(c) and 1870.

2. United States Code, Title 29: The Equal Pay Act, 29 U.S.C., 206(d).

3. United States Code, Title 42:

   The Civil Rights Act of 1866 and 1870, 42 U.S.C, Section 1981.

   The Civil Rights Act of 1861 and 1871, 42 U.S.C, Section 1985(3).

   Title VII, of the Civil Rights Act of 1964, 42 U.S.C., Sections 2000e, et seq.

STATEMENT OF THE CASE

The litigation from which this Petition for Writ of Certiorari arises began with the filing of a complaint in September, 1979, by plaintiff, Rosalind M.

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2 Appendix E contains text of statutes.

Plummer, Esquire, a black female attorney ("hereinafter, Ms. Plummer"), against certain named partners and the law firm partnership of Morgan, Lewis & Bockius, the defendants ("hereinafter, Defendants").

Ms. Plummer charged in her complaint that the defendant partners conspired to and that the defendant law firm did discriminate against her on the basis of her gender and race during her employment by Defendants and did compel her resignation and violate her civil rights as well as her rights under the employment contract.

The complaint alleged that throughout the brief history of the defendant law firm's involvement with female and black employees Defendants engaged in a course and pattern of conduct designed to curtail the mobility and tenure of black and female associate attorneys to partner-

ship positions and to force their premature resignation from the defendant law firm, particularly as they revealed partnership aspirations. Ms. Plummer further alleged that her treatment by Defendants was part of this overall pattern of discriminatory conduct.

The following federal statutes were identified by Ms. Plummer as being relevant to her claims; the Civil Rights Act of 1866 and 1870, 42 U.S.C., Section 1981; the Civil Rights Act of 1861 and 1871, 42 U.S.C., section 1985; Title VII of the Civil Rights Act of 1964, 42 U.S.C., Sections 2000(e), et seq. and the Equal Pay Act, 29 U.S.C., Section 206(d).

On October 2, 1980, this case was reassigned from the calendar of the Chief Judge of the Eastern District of Pennsylvania, the Honorable Joseph S. Lord, III, to the calendar of the current

trial judge, the Honorable Donald W. VanArtsdalen, without comment or explanation to the parties.

However, four years later, in the trial judge's post trial Memorandum Opinion of October 19, 1984, denying Ms. Plummer's Rule 59 new trial motion, Ms. Plummer was alerted for the first time that the October 1980 reassignment had not been a routine matter. In the revealing words of the trial judge;

> One final note needs to be addressed regarding this [Ms. Plummer's] contention [of partiality]. When this case was filed; it was originally assigned, under our random assignment system, to the then Chief Judge Joseph S. Lord. Judge Lord sent a memorandum, dated September 30, 1980, to the Clerk of Court, stating that he had recused himself because of his 'close personal relationship with Judge Masterson' who was a named defendant. ... The case was thereupon reassigned to me. Copies of the reassignment order were mailed to counsel although a copy of Judge Lord's memorandum was not. It is clear, however, that this court was aware of the potential problem

> involving Mr. Masterson. I accepted assignment of this case because, although I was a colleague, our prior professional relationship in no way affected my ability to sit as a judge in this matter.
>
> (Emphasis in original). (CR/DI #118, at page 17 of the Opinion.)

During discovery Ms. Plummer and her former counsel had sought, beginning in 1980, to obtain discovery of information calculated to disclose or lead to evidence of Defendants' past practice with respect to black and female employees. In that regard Ms. Plummer and her former attorney requested copies of Defendants' Equal Employment Opportunity Reports ("EEO-1 Reports").

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3 The parties received only a routine, non-explanatory reassignment order. Had Ms. Plummer received the internal memorandum, she could have proceeded with greater regard to the potential for prejudice in the courts of the Eastern District of Pennsylvania.

These EEO-1 Reports are 'verified and certified' documents prepared by Defendants in the normal course of conducting business and submitted to the federal government as part of Defendants' federal contract requirements.[4] The reports are prepared currently for each contract year and contain reliable information about the gender and racial turnover and composition of Defendants' employee pool.

The information contained in the EEO-1 Reports is directly relevant, as well as calculated to lead to other admissible 'pattern and practice' evidence. At the very least these reports could be used at trial to attack

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4 Since these EEO-1 Reports are routinely and currently prepared and certified by Defendants, the information is more reliable than notes prepared by and screened by Defendants' attorneys solely for use in this adversarial proceeding. It is also public information.

Defendants' credibility and honesty in connection with inconsistencioes in testimony and other discovery.

The District Court, nevertheless, prohibited Ms. Plummer's access to these reports and precluded disclosure of the names of the government agency in question to prevent Ms. Plummer from obtaining the EEO-1 Reports through the Freedom of Information Act. (CR/DI #61)

Moreover, the trial judge sustained Defendants' objections to use of the discovery information which was provided by Defendants on the premise that the information was too confusing and misleading to be reliable.

The District Court also took the position that Ms. Plummer could only pursue a disparate treatment theory and further confined her discovery to the period of her interaction with the

Defendants, from her summer interviews in 1976 through her departure in 1979.[5]

This case went to trial in August 1984, after the jury was enpaneled. Throughout the two weeks of trial testimony and during his charges to the jury, the trial judge made one-sided and disparaging comments on the evidence offered and extracted by Ms. Plummer which tended to eliminate or reduce its probative value. These comments were, without exception, to the exclusive prejudice of Ms. Plummer.

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5 For practical purposes this precluded Ms. Plummer from obtaining reliable evidence of how other black and female attorneys were supervised, evaluated, rated and paid over the term of their employment. Only approximately ten black attorneys had been employed during the 100 year old history of the firm and only since 1968.

The trial judge's substantive jury instructions were particularly interlaced with one sided commentary as to the judge's recollection of the evidence which had and had not been offered during the two weeks of trial testimony. For example, the jury was told in connection with the Equal Pay claim to consider that Ms. Plummer had offered no evidence of a difference in pay given females as opposed to males. However, evidence had been extracted during cross examination of one of the Defendants that another female, whose work was highly praised by Defendants during trial, had received the same low salary increase as had Ms. Plummer, while the males had uniformly received a higher increase.

Ms. Plummer made timely objections to such commentary and further objected that the judge's instructions in total sub-

stance and tonality would tend to mislead the jury as to the import of the evidence and impose a more stringent definition for "preponderance of evidence" than was proper. However, the judge's commentary had already had its effect.

In this setting of judicial partiality, voir dire was conducted, a jury was enpaneled, a jury foreman was selected and jury deliberations ensued. It is this following area, concerning the trial judge's direct involvement with and influence over the jury, that lies at the heart of this Petition for Writ of Certiorari.

In August of 1984, voir dire was conducted to select an eight person jury. Ms. Plummer's pretrial request for individual sequestration of prospective jurors during voir dire was denied by the trial judge.

A panel of 24 prospective jurors drawn from the July 30th Petit Panel were escorted into the courtroom on August 1, 1984, for voir dire. The litigants were then provided with a copy of the entire Petit Panel listing containing information on 183 prospective jurors. Of this voluminous listing, employment information was omitted for at least 36 prospective jurors.

In an acknowledged deviation from his customary practice, the trial judge was present throughout the voir dire and challenges to jurors were conducted in open court;

> It is my usual practice in civil cases to permit counsel, by agreement, to question the prospective jurors in my absence. If the attorneys cannot agree as to excusing some prospective juror or an attorney wishes to challenge for cause, the attorneys take the matter up with me in chambers 'on the record'. Because of contentious pretrial proceedings in this case, and to satisfy myself that the examination would be conducted

> fairly, I decided to have the entire voir dire carried out in open court, with myself and the court reporter present.
>
> (Page 7 of District Court Memorandum Opinion denying Ms. Plummer's motion for new trial. CR/DI # 118).

The trial judge justified this deviation by insisting that he wanted to ensure that voir dire was conducted fairly.[6] However, the only practical effect of the deviation was to preclude Ms. Plummer from discussing and challenging problematic jurors for cause outside of the hearing of the entire panel.

The 24 prospective jurors were for the most part questioned as a group, with the trial judge present to hear the responses throughout the voir dire.

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6 If the judge's concern was to protect Ms. Plummer, who was an inexperienced attorney proceeding pro se, from being manipulated by three experienced defense attorneys from established corporate law firms, the record is remarkably deficient in reflecting any such protective efforts.

The first twelve jurors, seated on the front row, were white. Based upon the responses of these twelve to voir dire questions, one unemployed juror felt he had lost his job as a result of an affirmative action program benefiting blacks, one objected to having a female supervisor or boss, at least one felt there were trades or professions in which women would not perform as well as men and another divorced panelist demonstrated an overall animosity towards women in questions concerning working women.

Then there was Ms. Anna Rogers, for whom no employment information had been provided in the Petit Panel listing. By the close of the voir dire it was revealed that Ms. Rogers had been legal secretary to a number of judges, including the trial judge.

It was also disclosed that she had been legal secretary to at least one member of the defense law firm.

Later, during trial, it was disclosed that one of the named Defendants was a former Eastern District judge and a colleague and contemporary of the trial judge.

In a post trial memorandum opinion, the trial judge further disclosed that the Chief Judge of the Eastern District of Pennsylvania had previously recused himself from this case because of his close personal relationship with the named defendant and material witness, the former judge. These latter facts were known to the trial judge during voir dire although they were not known at the time by Ms. Plummer.

With regard to Ms. Rogers, during voir the trial judge continually

maneuvered Ms. Plummer into the posture of having to publicly discuss her concerns, impressions and challenges to the propriety of Ms. Rogers' inclusion on the panel.

At the same time the trial judge made it audibly clear that he saw no reason for Ms. Rogers to be removed for cause and stated that he thought she was intelligent and would be fair. ("Let me say this: It is my impression that she is very intelligent and would be very fair." TR, at 43).

In an effort to avoid public confrontations, which could only prejudice the presentation of her pro se case, Ms. Plummer retorted that only that she thought Ms Rogers would probably be as "subjective" as the rest of the panel.

Then, at the first opportunity to do so outside of the hearing of the panel, Ms. Plummer asserted her challenges to three jurors for cause, including Ms. Rogers.

However, Ms. Plummer's efforts at confidentiality at side bar were frustrated when the trial judge gasped with amazement, stared at her in silence, audibly echoed her challenge to the jury panel, changed the subject and, while turning to face the panel, stated loudly and firmly that there was no basis for removal of any juror for cause.

The court reporter then returned to his seat, the judge terminated the side bar conference and turned fully to face

the panel without any further entertainment of Ms. Plummer's challenges:

(At side bar:)

THE COURT: Now, the way this would ordinarily work would be that we would strike off all of those beyond the first 14. That is the only way it could be done, I think.

MS. PLUMMER: I have three challenges.

THE COURT: You mean three challenges for cause?

MS. PLUMMER: Yes.

THE COURT: Oh.

MR. BECHTLE: Your Honor, bear with me. ...

THE COURT: In other words, ordinarily it would be the same as if we had just called up 14, which is all we would need if there were none for cause.

All right. You say you have some you want to challenge for cause? It would seem to me from the answers given there is probably no basis for cause for any.

MS. PLUMMER: Well, I don't want to take my chances with them and just use the peremptory challenges.

THE COURT: Then just leave the first 14 and make 3 peremptories from the first 14.

MS. PLUMMER: Is there any other procedure by which we can do this, Your Honor?

THE COURT: I don't know of any other proper procedure to do it.
(TR, from page 39, line 14, through page 40, line 11.)

In his Memorandum Opinion denying Ms. Plummer's motion for new trial, the judge attempts to explain what he refers to as the unresolved "ambiguity" on the matter of Ms. Plummer's challenges for cause;

Immediately following Mr. Bechtle's voir dire, plaintiff stated that she had three challenges for cause. I informed plaintiff that from the answers given, it seemed to me that there probably was no basis to strike anyone for cause. Plaintiff's reply that 'I don't want to take my chances with them and just use the peremptory challenges' is ambiguous. It could mean plaintiff either would just strike the three by using her peremptories or that she did not want to waste her peremptories to strike them. Whatever plaintiff meant does not matter.
(CR/DI #118, page 12, footnote 3.)

The only option the judge left available to Ms. Plummer for removal of Ms. Rogers was to relinquish one of her peremptory challenges by stipulating with defense attorney for her removal.[7] However, given the number of problematic jurors, relinquishment of her peremptory challenges was not an attractive option and she expressed that to the court.

The panelists seated as jurors ##15 through 24 were then dismissed and the litigants each used three peremptory challenges. In that process the Defendants used two of their peremptory challenges to remove the two black prospective jurors seated as jurors ##13 and 14.

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7 Such as it was, this option became available because even one of the defense attorneys felt constrained to acknowledge that it was unfair to include Ms. Rogers on the panel because of her relationship with a member of his firm.

No jurors were removed for cause by the trial judge and Ms. Rogers was seated by the judge's deputy as juror #1 of an all white, eight person jury.

Later, in his charges to the jury, the trial judge informed a group of seven layperson jurors and one legal secretary, Ms. Rogers (juror #1), that it was proper and customary practice to select juror #1 as the foreperson.

The trial judge's clerk and deputy then provided all copies of the blank interrogatory forms to Ms. Rogers. Moreover, prior to the selection of a foreman by the jury members, the trial judge addressed all questions intended for the jury as an entity to Ms. Anna Rogers.

Although the jury foreman had not been selected at the time, the trial judge continued to direct his comments and questions specifically to Ms. Anna

Rogers, as opposed to the entire panel, when jury deliberations were interrupted for an overnight recess on the evening of August 15, 1984.

When the jury's answers to the Special Interrogatories were finally returned at 11:17 A.M. on August 16, 1984, Ms. Anna Rogers identified herself as the jury foreman and as such she was the only person addressed by the court to respond to the interrogatory questions propounded to the jury.

In response to the crucial question, whether all members of the jury intended and understood by their interrogatory answers to find in Defendants' favor on all claims, the only responsive juror was Ms. Anna Rogers.

When Ms. Plummer requested a polling of the remaining jurors, the trial judge confined the inquiry to a recitation by

each of the jurors of the interrogatory answers without reading of the questions to which the answers were to be responsive. The judge's deputy conducted the limited polling and no polling was permitted as to general liability.[8]

At the conclusion of the trial the jury answered "NO" to each question of liability except 'whether they believed by a preponderance of the evidence that Ms. Plummer was constructively discharged', to which they responded "YES". However, the jury did not attribute that constructive discharge to either gender or race on the basis of the evidence which they could consider.

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8 The trial judge had previously denied Ms. Plummer's request for submission to the jury of a question concerning general liability and for submission of her pendent claim for breach of her employment contract.

Thereafter, on August 16, 1984, the trial judge filed a judgment in favor of Defendants on all claims, except the breach of contract claim for which he declined to make a ruling on the premise that pendent jurisdiction had not be specifically asserted in the complaint.[9]

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9 However, testimony and written evidence had been received during trial on this pendent claim, including the expressed terms and reasonable expectations Ms. Plummer was given about her employment in such areas as supervision, evaluations, salary, mobility and minimum tenure.

In particular, testimony had been received from the Defendants acknowledging that new employees were accorded a four to five year probationary period because of the learning process necessary for familiarization with procedures of the law firm and of the local courts.

However, in contrast, cross examination testimony and written evidence was also extracted from the Defendants to the effect that the two black females employed by the firm during Ms. Plummer's tenure were afforded only 6 month probationary periods and "warnings" within less than one year of employment.

On appeal to the Third Circuit Court of Appeals, Ms. Plummer challenged the overall partiality of the trial judge, with emphasis on his direct involvement and influence over the jury. Ms. Plummer also specifically raised the issue of the trial judge's manipulation of voir dire, frustration of the litigant's opportunity to challenge jurors for cause and the improvidence of his designation of the jury foreman under the circumstances.

Also, in her appeal Ms. Plummer informed the Court of Appeals, with specific descriptions, that the circumstances, tonality and physical actions accompanying the trial judge's recorded words were not reflected in the trial

record and that the transcript was otherwise incomplete.[10]

Ms. Plummer noted that one factor contributing to omissions in the trial record was the continuous and frequent changes in the court reporters several times during each hour throughout the two week trial, in order to accommodate Defendants' request for daily copy.

However, a request by Ms. Plummer for oral argument on appeal was denied. Thereafter, in a Memorandum Opinion, designated "Not to be Published", three Circuit Judges sanctioned the District Court's conduct.

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10 Nevertheless, Ms. Plummer's five volume Appendix did contain numerous instances of one sided commentary during trial and jury charges, inconsistencies between Defendants' testimony and the trial judge's findings of fact and unusual voir dire proceedings.

After recounting in detail and approving the trial judge's characterization of the facts,[11] the Circuit Court defended the trial judge's role in selection of Ms. Rogers as jury foreman.

Notwithstanding the trial judge's own acknowledgment of at least an "ambiguity" in the handling of Ms. Plummer's challenges for cause and an

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11 Although raised in the appeal to the Circuit Court, the question of inconsistencies between the trial record and the judge's findings of fact is not at issue in this Petition.

However, to balance the emphasis on the judge's characterization of the facts in the Circuit Court opinion, it should be noted that had the trial evidence demonstrated that Ms. Plummer's employment experience with the Defendants was the pleasant and sensitive experience described by the trial judge, the all white jury could not, as it did, have returned a "YES" to the question whether the preponderance of the evidence demonstrated that Ms. Plummer was constructively discharged.

abrupt abortion of those challenges on the record, the Circuit Court did not direct address the issue of judicial manipulation of voir dire.

Also, in response to Ms. Plummer's challenge of overall partiality and prejudice by the trial judge, the Circuit Court stated simply that the record did not support that contention, without addressing the instances of partiality raised by the appeal.

REASONS FOR GRANTING THE WRIT

I. The Federal Court of Appeals for the Third Circuit Has Rendered A Decision Which So Far Sanctioned A Departure By the District Court From the Accepted and Usual Course of Judicial Proceedings, and Has Itself So Departed From the Accepted and Usual Course of Judicial Proceedings, As to Require and Demand the Exercise of this Court's Power of Supervision.

There can be no finality in a decision and an orderly society can not be maintained if the courtroom is robbed of its impartiality and neutrality with respect to the litigants. The district court, therefore, has a duty to ensure that a judgment is not influenced by partiality or prejudice from either the jury or the trial judge. Barrett v. Robinson, 65 F.R.D. 652 (E.D.Pa. 1975).

It is clearly not an easy matter to separate our conduct from our conscious and subconscious feelings and loyalties. Justifications are always available for our unfavorable treatment of individuals

who confront or threaten our way of life, our personal and professional colleagues or respected and influential members of our community.

However, members of the judiciary - the framers, arbitrators, determiners and enforcers of the law - have a higher calling; they have an 'affirmative' duty to protect the integrity of the judicial process by eliminating the potential for partiality and prejudice from themselves and from the jury.

In the wise words of this Court in Swain v. Alabama, 380 U.S. 202, at 219 (citing Lewis v. United States, 146 U.S. 370, at 376 and In re Murchison, 349 U.S. 133, at 136); " . . .to perform its high function in the best way 'justice must satisfy the appearance of justice'."

Petitioner has the unfortunate task of requesting that this Court examine a case where the Court of Appeals sanctioned the district court's violation of a litigant's most essential rights; the right to a fair trial before an impartial jury.

From the inception of discovery through the rendering of a judgment, the experienced trial judge in this case engaged in conduct designed first, to restrict and manipulate the plaintiff from having a case to present to the jury, and second, to manipulate plaintiff and the jurors so as to restrict challenges and exercise improper influence and control over the jury deliberation process.

The trial judge also left the jury open to influence from the defense attor-

neys, with full knowledge that there was a clear and obvious potential for such abuse.

A pro se litigant and an inexperienced attorney should neither expect nor demand any special consideration from the court. Neither, on the otherhand, should they have to 'out maneuver' the trial judge, in addition to opposing counsel, in order to simply protect essential and basic rights to which all parties are entitled; 1) the right to challenge jurors for cause and with some degree of confidentiality, 2) the right to exercise three unhindered peremptory challenges, 3) the right to an impartial jury and 4) the right to a jury unbiased by one sided, disparaging and prejudicial commentary from the bench.

However, it is the violation and frustration of these essential rights which lies at the heart of this Petition.

While the trial judge is not merely a moderator, ". . .he should always be a 'neutral' empire." Jackson v. United States, 329 F.2d 893, 894 (D.C. Ct. of App. 1964). In jury cases a particular demand is placed on the trial judge to exercise great restraint and caution because of the obvious danger that his intervention will have prejudicial consequences. Jackson, supra.

This Court reiterated that principle, in United States v. United States Gypsum Co.[12] and Rogers v. United States,[13] and determined that on review the trial judge is held to a higher standard of conduct

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12 438 U.S. 422, 98 S.Ct. 2864 (1978).

13 422 U.S. 35, 95 S. Ct. 2091 (1975).

and compelled to give more careful consideration in acting on matters which may affect the impartiality of a juror.

In Rogers v. United States, supra., this Court further acknowledged that both the verbal and non verbal communications of the trial judge could act to have a coercive effect on a jury.

In Jackson, supra, the Court of Appeals for the District of Columbia took the position that the appellate court is required to review the cumulative impact of the trial judge's overall activities, and not merely review single acts or comments without consideration of the overall circumstances or non-verbal conduct giving definition and import to those single acts.

It is obviously misleading to the jury for a trial judge to single out only evidentiary features favorable to the

Defendants after two weeks of trial testimony, as was done in this case.

Under comparable circumstances, where the trial judge made commentary which was partial and one sided, the Third Circuit Court of Appeals determined that such commentary constituted reversible error. Kornicki v. Colmar Steamship Corporation, 460 F.2d 1134, 1137-1139 (3d Cir. 1972). See also Systems, Inc. v. Bridge Electronics Co., 335 F.2d 465, 467 (3d Cir. 1964); Cromling v. Pittsburgh & L. E. R. Co., 327 F.2d 142, 152 (3d Cir. 1963); Sleek v. J. C. Penny Co., 324 F.2d 467, 478-479 (3d Cir. 1963).

The Fifth and Eighth Circuit Courts of Appeals applied the same principle in Burleson v. Champion, 283 F.2d 653, 655 (5th Cir. 1960) and Chicago & North Western Ry. v. Rieger, 326 F.2d 329, 336 (8th Cir.), cert. denied, 377 U.S. 917,

84 S.Ct. 1182 (1964); Halladay v. Verschoor, 381 F.2d 100, 113 (8th Cir. 1967), respectively.

Indeed, the facts in this case should have been even more compelling to the Third Circuit Court because the trial judge did not confine his partial conduct to comments on the testimony; he also directly interfered with with the natural function of the jury and its collective mind under circumstances where the potential for partiality and improper influence was clear and apparent.

Even assuming, arguendo, that it was completely appropriate for the trial judge not to remove Ms. Rogers from the jury, either for cause or sua sponte under Sections 1866(c)(2) and (c)(5) of the Jury Selection and Service Act,[14] he overstepped the reasonable boundaries of discretion and propriety when he

compounded an obvious problem by lobbying to secure the selection of Ms. Rogers as jury foreperson.

While under ordinary circumstances a jury foreman might serve purely an administrative function, there can be no question that a layperson juror in this case would interpret from the extraordinary attention and respect accorded Ms. Rogers by the trial judge that she as legal secretary had a superior attribute or ability in that posture.

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14 28 U.S.C., Sections 1866(c) . . .any person summoned for jury service may be . . .(2)excluded by the court on the ground that such person may be unable to render impartial jury service as a juror or would be likely to disrupt the proceedings, or . . .(5)excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations.

The Circuit Court, however, disregarded the non verbal pressures placed on the jurors and reasoned that the judge uttered one sentence of self protective language and therefore did not force the jury to select Ms. Rogers.

The Circuit Court gave no cumulative import whatsoever to the earlier disclosures made about Ms. Rogers during voir dire or to the fact that the trial judge had superior knowledge of facts which clearly tested the propriety of enpaneling her.

In addition, it is unlikely that an all white layperson jury in a gender and race discrimination case would question the wisdom of the trial judge in such matters as the selection of the jury foreperson.

The Third Circuit also did not address the trial judge's contrivances

and intimidations during voir dire to preclude Ms. Plummer from clearly establishing her three challenges for cause. On this issue the Third Circuit's reasoning is not clear except that they may have been reasoned that Ms. Plummer should have relinquished one of her peremptory challenges to remove Ms. Rogers.

However, this Court and several other circuit courts of appeals have held that it is reversible error to force a party to relinquish a peremptory challenge in order to remove a juror who is properly removable for cause, even in the absence of actual prejudice. Swain v. Alabama, 380 U.S. 202, at 219, 85 S.Ct. -, at 835 (1964). See also 28 U.S.C., Sections 1866(c)(2),(4) and (5) and Section 1870.

Several circuit courts, including the Third Circuit, have rendered decisions to similar effect, Carr v. Watts, 597 F.2d 830, 833 (2d Cir. 1979)(the indirect error of improperly denying a challenge for cause that compels the unnecessary use of a peremptory challenge can also be reversible error); Blount v. Plovidba, 567 F.2d 583, 585 (3d Cir. 1977); United States v. Rucker, 557 F.2d 1046 (4th Cir. 1977); Chestnut v. Ford Motor Company, 445 F.2d 967, 972 (4th Cir. 1971); United States v. Nell, 526 F.2d 1223, 1227-1230 (5th Cir. 1976); Hathorn v. Trine, 592 F.2d 463 (8th Cir. 1979).

Even assuming there was no isolated action by the trial judge which, standing alone, is sufficiently prejudicial to constitute a reversible error or abuse of discretion, the cumulative and clear

impact of the trial judge's overall conduct in this case compels at least an informed consideration of the matter by the Third Circuit through oral argument. See Jackson, supra.

II. The Questions Raised in this Petition Involve Issues of Exceptional Importance:

A. The Extent of A Federal Trial Judge's Affirmative Obligatiion to Protect the Integrity of the Jury from the Potential for Improper Influences.

The Federal Jury Selection and Service Act is somewhat limited in the guarantees which it specifically defines. However, the absence of express guarantees in the language of the Act does not mean that a trial judge should be able to engage in a course of conduct designed to frustrate the overall objectives of the Act; to ensure a fair and impartial jury. See United States v. Robinson, 421 F. Supp. 467 (D.Conn.

1976)(where the prosecutor used his peremptory challenges solely to exclude blacks from service).

This right to an impartial jury is equally applicable to the civil litigant. Carr v. Watts, supra. In addition, the trial judge has an affirmative obligation to apply prudence to remove jurors who no reasonable person could maintain would not be affected in their freedom of judgment. See 28 U.S.C., Sections 1866(c)(2), (c)(4) and (c)(5).

In this case the trial judge, himself, manifested a partiality and bias to Ms. Plummer's detriment. The reasons for such partiality became clearer during the course of the trial when it was disclosed that the trial judge was a professional colleague and contemporary of one of the named defendants, a former Third Circuit judge. Moreover, it was further

disclosed later, in post trial memorandum opinions, that the Chief Judge of the same Eastern District of Pennsylvania had previously recused himself from the case because of his relationship to the same named defendant.

The fact that the trial judge previously maintained an authoritative and supervisory role with respect to the recommended jury foreperson, Ms. Anna Rogers, is not as compelling as the fact that this same juror held a similar posture to a member of the defense law firm and several other judges in an action where a named defendant was a former federal judge.

The evidence of the clear taint of partiality in this case evolved over the

course of the trial through the gradual disclosure of conduct and facts known to the trial judge from the inception of the case.

The trial judge had an affirmative duty to remove that taint since neither the suspect juror, Ms. Anna Rogers, nor anyone else could reasonably say that she, as well as the jurors upon whom she impacted as their foreperson, was not affected in her freedom of action as a juror. See Remmer v. United States, 350 U.S. 377, 76 S. Ct. 425(1956).

Moreover, since the jurors were at no point sequestered, the potential for direct external influence on Ms. Rogers was clear and apparent during the overnight recess.

The trial judge and, apparently, the Third Circuit Court of Appeals takes the position that it was fully within the

trial judge's discretion both to permit Ms. Rogers to remain on the panel and to recommend her for service as jury foreperson.

Petitioner disagrees with the Third Circuit, the trial judge surely abused his judicial discretion in these matters. Indeed, the Petitioner goes a step further and submits that, in not remcving Ms. Rogers as juror under the circumstances of this case, the trial judge actually violated his affirmative duty to protect the integrity of the entire jury from the clear potential for abuse and improper influence.

Clearly, under the Federal Jury Selection and Service Act, the trial judge is the only person empowered to take such affirmative measures to ensure fairness.

He cannot transfer that responsibility to the litigants or avoid his responsibility by contriving public debates and restricting the for cause challenges. The fact that a more experienced plaintiff might not have been intimidated by the trial judge's contrivances is inconsequential.

B. The Providence of Restricting the Practice by Several Courts of Appeals, Permitting the Trial Judge to Select the Jury Foreman, in Order to Protect A Litigant's Right to an Impartial Jury.

Petitioner further submits that this Court should address the question whether limitations, at least of fairness and abuse of discretion, should be imposed on the current practice in the several Circuit Courts of Appeals of permitting the trial judge absolute authority to select jury foremen. As the circumstances of this case demonstrate, such a practice, unrestricted, can be

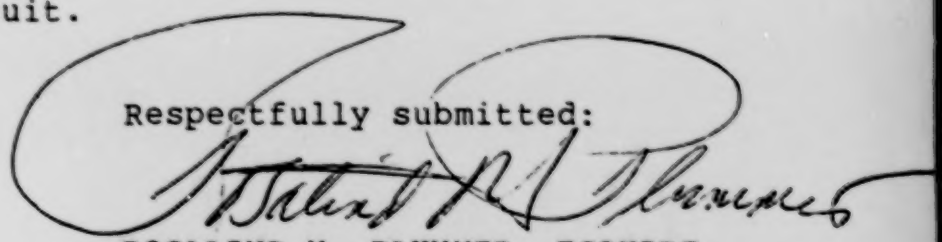
used as one of several cumulative vehicles for the exercise of improper and excessive control over jurors.

In addition, even in a neutral context, the selection of the jury foreman is, in a real sense, part of the adversarial process. It should be shaped by the natural interest of jurors and should draw motivation more from the evidence and the compelling arguments of counsel than from the convenience of the court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgments and opinions of the United states Court of Appeals for the Third Circuit.

Respectfully submitted:



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